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NO. _____

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 62142-4-I)



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STATE OF WASHINGTON,

Respondent,

v.

ROGER WRIGHT,

Appellant.

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# PETITION FOR DISCRETIONARY REVIEW

# TO THE SUPREME COURT OF WASHINGTON

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Richard Hansen

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## A. IDENTITY OF PETITIONER

Petitioner Roger Wright was the Appellant in the Court of Appeals and Defendant in the King County Superior Court proceeding from which this appeal was taken.

## B. COURT OF APPEALS DECISIONS

Roger Wright was originally convicted of two counts of possession of marijuana and MDMA following the denial of his motion to suppress. His direct appeal to the Court of Appeals affirmed the trial court's decision, but then the defense filed a motion for reconsideration in light of the United States Supreme Court decision in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct: 1710, 173 L.Ed.2d 485 (2009). Before argument on the motion for reconsideration, this Court issued its decision in *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), which was not briefed by the parties but was the subject of oral argument.

Despite this, the Court of Appeals again affirmed the trial court based upon the so-called "Scalia exception" in the *Gant* decision, which permits a warrantless search of a vehicle based upon probable cause that it contains evidence of the crime of arrest. Specifically, the Court of Appeals held:

> Because the police had probable cause to arrest Wright for possession of marijuana and to search the car for evidence of the drug crime, the search of the passenger compartment

of the car incident to arrest did not violation Article 1, Section 7.

Slip Op. at 18-19. In a brief footnote accompanying that holding, the Court mentioned that "Wright cites the Supreme Court's recent decision in *Valdez*. *Valdez* does not change our analysis in this case." Slip Op. at 19, fn 11 (referring to *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

A copy of this final decision from Division I is attached hereto for the Court's reference.

## C. ISSUES PRESENTED FOR REVIEW

1. Whether recent decisions of this Court and the United States Supreme Court require the police to obtain a warrant prior to conducting an intrusive search of a vehicle for drugs, even where there is probable cause to believe the driver may have been smoking marijuana.

2. Whether the so-called "Scalia exception" to the Supreme Court's recent decision in *Arizona v. Gant, supra*, is constitutional under Art. 1, section 7 of the Washington State Constitution, which prohibits the police from invading the "private affairs" of citizens "without authority of law."

3. Whether the trial court and Court of Appeals erred in finding there was either probable cause or reasonable suspicion for Officer Gregorio to stop Defendant Wright, question and arrest him, then conduct

a warrantless search of his car for failing to have his headlights turned on even though the law did not require headlights at that time of day.

4. Whether the trial court erred in finding that the stop of Defendant Wright was not illegal as pretext search.

5. Whether evidence of marijuana and MDMA ('ecstasy') recovered as a result of the warrantless search of Mr. Wright's vehicle should have been suppressed and the charges dismissed.

## D. STATEMENT OF THE CASE

Seattle police officer Chris Gregorio was on "routine patrol, handling 911 calls, enforcing traffic, contacting people out on the streets" when he stopped Roger Wright on "November 29 of 2006 at about 4:45 p.m." RP 5-6. He identified Mr. Wright as a "black male," and contacted him "on south Roxbury Street," a neighborhood the officer described as a "hotspot." Officer Gregorio explained this term as follows:

> If there's what we call hotspots, there is a lot of crime in any particular area, usually you'll have officers kind of floating around the area. If there's burglaries in that particular area, usually we get a lot of people traveling the area looking for any suspicious activity and things like that. If there's hot drug areas, again those areas kind of get flooded with officers.

RP 8 (emphasis added). This particular area was known "for burglaries and car prowls," according to the officer. *Id.*

The officer claimed that he decided to stop Mr. Wright because his headlights were off. There was nothing reckless about Mr. Wright's driving, he was not speeding or committing any other traffic infractions. RP 29. The officer radioed in Mr. Wright's license plate and determined that the car was not stolen, there was no defective equipment and that Mr. Wright pulled over "in a safe and lawful manner" after the officer initiated the traffic stop with his emergency lights. RP 30. The officer never did issue a citation to Mr. Wright for driving without his lights or any other infraction. RP 31.

Mr. Wright was alone in the vehicle but Officer Gregorio nevertheless "called for another officer to arrive on the scene." RP 13.[1] He approached on "the driver's side" and claimed to smell "a strong odor of marijuana emitting from the vehicle." RP 14-15. The Defendant was questioned, produced a bill of sale for the car and, while the glove box was open the officer "was able to see a large roll of money." RP 16-17. Officer Gregorio ordered Mr. Wright

> to exit the vehicle because he was under arrest. He began blubbering and telling me he did not want to get out of the car. I opened up the car door and told him that if he did not get out of the car I would take him out of the car. He

[1] Normally, the officer would not ask for backup unless perhaps the car has "three, four people in it, . . . for officer safety reasons." RP 32. The officer's written report made clear that he was concerned because "this area has been a hotspot for car prowls and vehicle thefts," which was "something that was weighing heavily" on his mind. RP 33. He admitted he had no reason "to believe that [Mr. Wright] was involved in a car theft."

> reluctantly exited the car, I grabbed the back of his shirt to hand him off to Officer Larned to place him under arrest and search him for weapons.

*Id.*

Officer Gregorio placed Roger Wright in the back seat of Officer Larned's car and read him his *Miranda* warnings. RP 17-18. Mr. Wright waived his *Miranda* rights and asked:

> Why are you asking me this, sir? You said you pulled me over because you thought I was in a stolen car. I told you I wasn't. Can't you just give me my ticket and let me go, sir, . . .

RP 20 (reading quotation from police report). The Defendant was questioned further and told the officer "he was smoking marijuana earlier." *Id.* The officer persisted in questioning him about the presence of marijuana in the car and, according to Officer Gregorio:

> Alls he would tell me is he was smoking it. . . . At that point, realizing that my investigation with him and questioning wasn't going anywhere, I just requested a dog . . . so a Renton police officer and his K-9 responded to search the car for me.

RP 21.

After the canine unit arrived a dog uncovered two baggies of marijuana and a prescription bottle of oxycodone (in the name of Roger Wright) in the console. It also uncovered two more baggies of marijuana and a scale in a larger bag in the back seat. RP 73. Based upon this

warrantless search, Officer Gregorio obtained a search warrant for the vehicle and recovered a small bag (9 grams) and a large bag (246 grams) of marijuana. Also in the trunk was a Ziploc bag containing MDMA (ecstasy). RP 74-79.

It is interesting to note that backup Officer Larned's report indicated that he was summoned to the scene because of "a suspicious vehicle stop." Officer Gregorio described this term as follows:

> Suspicious vehicle stop would be a vehicle sitting in an area for an undetermined time, people sitting in the vehicle, high drug, high crime activity areas, driving slowly through neighborhoods in a blacked out, possibly casing the neighborhoods, instances like that.

RP 35. Officer Larned's report said nothing "about headlights being out." *Id.* at 36. Similarly, in the Affidavit of Probable Cause signed by Officer Larned, the first reason he gave for this stop "is hotspot for car prowls and vehicle thefts." RP 38.

According to computer records, the stop occurred at 4:45 in the afternoon, 26 minutes after sunset. RP 24-25. Since the law does not require that headlights be turned on until 30 minutes after sunset, *see* RCW 46.37.020, the State conceded that the stop happened "six minutes shy of . . . the sunset provision of the traffic code." RP 58. The trial court specifically found that "we're shy of about six minutes there from the infraction standpoint." *Id.* at 49.

However, the court ultimately concluded that there was "a reasonable suspicion" to justify the stop. RP 59-60.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court held that a police officer was justified in conducting a warrantless search of the entire passenger compartment of a vehicle that had been lawfully stopped. The *Belton* decision has been widely interpreted to allow such searches without the benefit of a warrant and without probable cause to believe there are weapons or evidence of a crime to be found in the car.[2]

However, in *Arizona v. Gant*, *supra*, the United States Supreme Court recently overruled this interpretation of *Belton*, holding that warrantless searches of the passenger compartment of a vehicle incident to a valid arrest are no longer constitutional:

> Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton*, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the

[2] This Court adopted this interpretation of *Belton* more than twenty years ago in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), where the Court upheld a warrantless search of the defendant's vehicle, the luggage inside the passenger compartment and the glove compartment, citing *Belton* and interpreting it as follows:

> The Supreme Court, in *Belton*, held that the dangers to the officers and the possible destruction of evidence justified the search of all containers and the passenger compartment of a car pursuant to a lawful custodial arrest.

*Stroud*, 106 Wn.2d at 151.

> arrestee could gain access to the vehicle at the time of the search.
>
> * * *
>
> Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. . . . Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

129 S.Ct. at 1719, (citing *Chimel v. California*, 395 U.S. 752 (1969)). The *Gant* Court concluded:

> Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

*Id.* (fn. omitted).

Despite the Court's decision in *Gant*, the Court of Appeals below nevertheless upheld the search of Roger Wright's car based upon the so-called "Scalia exception" to the *Gant* holding. According to this dictum from *Gant*:

> Consistent with the holding in *Thornton v. United States*, 541 U.S. 615 (2000), and following the suggestion in Justice SCALIA's opinion concurring in the judgment in that case . . . we also conclude that circumstances unique to the automobile context justify a search incident to arrest

> when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

*Gant*, 129 S.Ct. at 1714.

### 1. Under Article 1, Section 7 of the Washington Constitution, this Court Should Reject the *Gant* Dictum and Hold that the Warrantless Search of the Wright Vehicle was Unconstitutional

In *State v. Eisfeldt,* 163 Wn.2d 628, 185 P.3d 580 (2008), this Court reiterated its reasoning from *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002), that "the protections guaranteed by article I, section 7 of the State constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution." *Id.* at 634. "Exceptions to the warrant requirement are narrowly drawn, and '[t]he State bears a heavy burden in showing that the search falls within one of the exceptions.' *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)." *Id.* at 635.

### 2. The Holding of *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), and Other, More Recent Decisions of This Court, Require Suppression of All The Evidence in this Case

In *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), this Court reasoned:

> Based on our understanding of Const. Art. I, sec. 7, we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. . . . A warrantless search in this

> situation is permissible *only* to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

*Id.*, at 699. The search was held to be unjustified "because of the lack of danger posed to the officers once the suspect was in the patrol car, and because the van was lawfully parked and immobile," thus leading to the conclusion that "the warrantless search was in this case disallowed." *Id.* at 150-51.[3]

The *Ringer* Court invalidated precisely the type of warrantless search that occurred here, after Mr. Wright had been safely removed from the vehicle and no longer had access to it because:

> Only after Ringer was handcuffed and removed from the immediate vicinity of his van did the troopers search the vehicle. Likewise, in *Corcoran*, defendant left his vehicle prior to being placed under arrest. He had been handcuffed and placed in a patrol car when the police searched his vehicle.

*Id.* at 700. The Court then reversed both convictions:

> We conclude that the search of Ringer's van and Corcoran's car exceeded the authority of law enforcement officers to search pursuant to arrest. Furthermore, while state troopers may have had probable cause to search Ringer's van, they have failed to show that exigent circumstances obviated the need to seek a warrant prior to the search.

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[3] In *State v. Stroud, supra*, the Court held "that this part of the opinion must be overruled," *citing New York v. Belton*, 453 U.S. 454 (1981). Now that *Gant* has overruled *Belton*, the *Ringer* holding has effectively been resurrected and frequently cited by this Court in recent decisions discussed *infra*.

*Id.* at 703.

The *Ringer* Court concluded "that Const. art. I, § 7 poses an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions which we will note below." *Id.* at 690. Those exceptions to the warrant requirements are as follows:

> Based on our understanding of Const. art. I, § 7, we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested. . . . The exception must be "jealously and carefully drawn," and must be strictly confined to the necessities of the situation.

*Id.* at 699 (numerous citations omitted).

The same is obviously true in this case, which is factually indistinguishable from the search of Ringer's van. Mr. Wright had been fully removed from the vehicle, placed in handcuffs and secured in the back of a patrol car under the supervision of Officer Larned. The warrantless search that followed was very intrusive, utilizing a K-9 unit with a dog to find and seize marijuana and a scale which was then utilized to get a search warrant for the trunk.

The holdings of two recent decisions from this Court also require suppression of the evidence herein. In *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009), a post-*Gant* case, this Court relied on *Ringer* to hold that the search of a defendant's vehicle by a K-9 unit exceeded the permissible scope of a search incident to arrest. As in this case, the officer stopped the vehicle for a headlight violation and the defendant was found to have an outstanding felony warrant. After the driver had been "handcuffed and secured . . . in the patrol car, the officer searched the vehicle and noticed loose dashboard panels," and called "a K-9 unit" which discovered "methamphetamine located under a molded cup holder." *Id.* Relying on the now invalidated holding in *State v. Stroud*, *supra*, the trial court refused to suppress the evidence. *Id.* at 766-67.

The *Valdez* Court limited on the narrow exceptions to the rule allowing warrantless searches "only to remove any weapons the arrestee might seek to use in order to resist arrest or affect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested." *Id.* at 758 (*quoting State v. Ringer*, 100 Wn.2d at 699). The Court reasoned:

> . . . after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence

> does not justify a warrantless search under the search incident to arrest exception.

*Id.* at 777.[4] This specific language from the *Valdez* opinion clearly and unequivocally rejects the Scalia exception to *Gant* where "an arrestee is secured and removed from the automobile," because then the individual "poses no risk of . . . destroying evidence *of the crime of arrest located in the automobile*, . . . ." *Id.* (emphasis added).

Thus, the Court's analysis of article 1, section 7 would require suppression of the evidence seized pursuant to the warrantless search of Mr. Wright's vehicle, even though that evidence was related to the crime of arrest, because

> **There is no showing that a delay to obtain a warrant would have endangered officers or resulted in evidence related to the crime of arrest being concealed or destroyed.** As such, the warrantless search violated article 1, section 7 of the Washington Constitution as well as the Fourth Amendment. The evidence collected from that search should be suppressed, and the resulting convictions reversed.

*Id.* at 779 (emphasis added).

Likewise, in *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), this Court again invalidated a warrantless search of a vehicle:

> We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of

[4] The *Valdez* Court also recognized that "*Stroud's* expansive interpretation to the contrary was influenced by an improperly broad interpretation of *Belton* . . . . And that portion of *Stroud's* holding is overruled." *Id.* at 777 (internal citations omitted).

> the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

*Id.* at 384 (fn. omitted). *Patton* applied *Ringer* to interpret the search incident to arrest exception to warrant requirement as resting "on concerns for officer safety and the potential destruction of evidence of the crime of arrest." 167 Wn.2d at 389 (*citing Ringer*, 100 Wn.2d at 699-700). The Court reasoned:

> We emphasize that the search incident to arrest exception must be narrowly applied, consistent with its common law origins allowing an arresting officer to search the person arrested **and the area within his immediate control.**"

*Id.* (emphasis added). As the Court noted:

> It would stretch the search incident to arrest exception beyond its justification to apply it where the arrestee . . . is physically detained and secured away from the vehicle before the search.

*Id.* at 394. The *Patton* Court reasoned

> the circumstances here simply do not involve a search *incident* to arrest. . . . . No connection existed between Patton, the reason for his arrest warrant, and the vehicle. . . . . At the time of the search, Patton was secured in the patrol car, some distance from his vehicle.

*Id.* at 395 (emphasis in original).

### 3. Officer Gregorio Clearly Did Not Have Probable Cause to Stop Mr. Wright for Having His Headlights Off 25 Minutes After Sunset on a Clear Day.

Officer Gregorio's report states that Mr. Wright was "driving without headlights" at 4:45 p.m., but headlights were not required at that time. *See supra* at 6-7; and RCW 46.37.020. Accordingly, there was no valid basis for the stop.

Traffic stops for violation of traffic laws based on less than reasonable suspicion are unconstitutional. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held that stopping a vehicle to check the driver's license and automobile registration, where neither traffic nor equipment violations or suspicious activity preceded the stop, was unreasonable under the Fourth Amendment.

"Reasonable suspicion" is defined as "the ability to reasonably surmise from the information at hand that a crime was in progress or had occurred." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (*citing United States v. Cortez*, 449 U.S. 441 (1981)). A *Terry* stop is not justified where, in the course of a traffic stop, the officers believed that the driver was more nervous than normal because

> it is not unusual for drivers to be unable immediately to find their vehicle's registration and proof of insurance. And "most persons stopped by law enforcement officers

> display some signs of nervousness." *State v. Barwick*, 66 Wn.App. 706, 710, 833 P.2d 421 (1992). . . . Therefore, at the time Deputy Small escalated the routine traffic stop into a *Terry* stop, he had no objectively reasonable basis for the search. The detention was not a legitimate *Terry* stop.

*State v. Henry*, 80 Wn.App. 544, 910 P.2d 1290 (1996). Accordingly, the drugs found on the defendant were suppressed. *Id.*

### 4. A Traffic Stop May Not be Used as a Pretext to Search for Evidence

In Washington, the police are not allowed to use an otherwise valid traffic stop as a pretext to search a vehicle for evidence. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). In *Ladson*, this Court reasoned that article 1, section 7 creates

> a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement. We therefore hold pretextual stops violate article I, section 7, because they are seizures absent the 'authority of law' which a warrant would bring. Const. art. I, § 7.

*Id.* at 358.

In *State v. Montes-Malindas*, 144 Wn.App. 254, 182 P.3d 999 (2008), a Wenatchee police officer observed the defendant,

> Jesus Montes-Malindas and two other people in a van, acting nervously. One of the men in the van got out and into another occupied car, and left the area. Mr. Montes-Malindas then switched places with the occupant in the driver's seat.

182 P.3d at 1001. The officer parked his cruiser so he could observe the van and:

> When the van pulled out of the parking lot onto Miller Street, Sergeant Dresker noticed that the headlights of the van were not illuminated, although it was dark. As the van passed, Sergeant Dresker pulled out and got behind the van. The driver then turned the headlights on. The van had driven about 100 yards without its lights illuminated.

*Id.*

The van was searched incident to arrest and resulting in the seizure of "some narcotics paraphernalia," a firearm and "a residue-filled baggie that contained crystal methamphetamine. The defendant was charged with possession of the methamphetamine and first degree unlawful possession of a firearm." *Id.*

The Court rejected the officer's explanation for his conduct, "that the stop was made only because of the delayed engagement of the headlights." 182 P.3d at 1003. Rather, the Court considered that Sergeant Dresker "also stated that he was suspicious of the activity that he saw in the parking lot." Thus, the Court concluded "that those suspicions probably were on his mind when he decided to pull over the van and approach the passenger side, rather than the driver's side." *Id.*

In this case Officer Gregorio noted in his own report that "[t]his area has been a hotspot for car prowl and vehicle thefts. I activated my

emergency lights and initiated a traffic stop." *See* RP 33 and Exhibit 3. It is equally noteworthy that Officer Larned's report described this as "a suspicious vehicle stop" after receiving a radio call for backup assistance from Officer Gregorio. *See* RP 35-36. No driving citation was issued against Mr. Wright by either officer.

Therefore, Officer Gregorio's claim that he stopped Mr. Wright's vehicle for a headlight violation is even weaker than the stop in *Montes-Malindas*, where the car drove long after dark without its lights on. As noted above, Mr. Wright had no legal obligation to turn his lights on at the time of the stop and his actions in briefly backing up are hardly illegal. *Accord*: *State v. Myers*, 117 Wn.App. 93, 94-95, 69 P.2d 367 (2003) (reversing conviction where officer admitted that he pulled a driver over to check if the driver's license was suspended, rather than to cite the driver for making two lane changes while signaling simultaneously); *State v. Meckelson*, 133 Wn.App. 431, 437, 135 P.3d 991 (2006), *rev. denied*, 159 Wn.2d 1013, 154 P.3d 919 (2007) ("It is not enough for the State to show that there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.").

### 5. If the Initial Stop was Illegal, than any Evidence Seized or Statements Made by the Defendant Must be Suppressed.

As noted in *Montes-Malindas*, "If a pretextual stop occurs, the Washington Constitution requires that 'all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.' *Ladson*, 138 Wn.2d at 359, 979 P.2d 833." *Id.* at 1002. *State v. Eisfeldt*: "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." (*Citing Wong Sun v. United States*, 371 U.S. 471, 485 (1963).) *State v. Eisfeldt*, *supra,* 163 Wn.2d at 640.

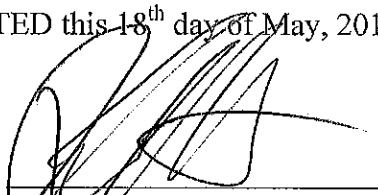
## F. CONCLUSION

The rationale of *Stroud*, as recently applied by this Court in the *Valdez* and *Patton* cases interpret article 1, section 7 of the Washington Constitution to prohibit *any* warrantless search of a vehicle, even for evidence of the crime of arrest, once the defendant has been safely removed and secured in another police vehicle, as occurred in this case. Petitioner also encourages this Court to find that the initial stop was invalid, and that it was also the result of an unconstitutional pretext to search Mr. Wright's car because it is well documented in the reports from Officer Gregorio and Officer Larned that the neighborhood was a "hot

spot," and that this was "a suspicious vehicle stop," according to Officer Gregorio's written report.

Accordingly, all the fruits of this search, including those uncovered through the execution of a tainted warrant, must be suppressed. And, in the absence of any admissible evidence, the charges should be dismissed with prejudiced. *State v. B.J.S.*, 140 Wn.App. 91, 97 n.2, 169 P.3d 34 (2007); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307 (1979).

RESPECTFULLY SUBMITTED this 18th day of May, 2010.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

## PROOF OF SERVICE

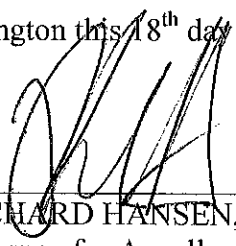
Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 18th day of May, 2010, I sent by U.S. Mail, postage prepaid, one true copy of Petition for Discretionary Review directed to attorney for Respondent:

Stephen Hobbs
Deputy Prosecuting Attorney
Appellate Division
King County Prosecutor's Office
516 Third Ave., W554
Seattle, WA 98104

And mailed to Appellant Roger Sinclair Wright.

DATED at Seattle, Washington this 18th day of May, 2010.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | No. 62142-4-I |
| Respondent, | ) | |
| v. | ) | PUBLISHED OPINION |
| ROGER SINCLAIR WRIGHT, | ) | |
| Appellant. | ) | |
| | ) | FILED: April 19, 2010 |

SCHINDLER, J. — In an unpublished opinion, we rejected Roger Sinclair Wright's argument that the trial court erred in denying his motion to suppress because the officer lacked justification to stop him for a traffic infraction or that the traffic stop was a pretext, and affirmed his convictions for possession of marijuana with intent to distribute and possession of methylenedioxymethamphetamine (MDMA a/k/a "Ecstasy").[1] Wright filed a motion to reconsider based on the recent United States Supreme Court decision in Arizona v. Gant, ___ U.S. ____, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Wright contends that the decision in Gant and the Washington State Supreme Court's recent decision in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) compel a different result. We disagree. Unlike Gant, because the police arrested Wright for possession of marijuana and had reason to

[1] By separate order, the unpublished opinion filed on April 27, 2009 is withdrawn.

believe evidence of the crime might be found in the car, there is no violation of the Fourth Amendment. And unlike in Patton, because the police had probable cause to arrest Wright for possession of marijuana, and a nexus between Wright, the crime of the arrest, and the search of the vehicle, there is no violation of article I, section 7 of the Washington State Constitution. We deny Wright's motion to reconsider, and affirm.

## FACTS

Wright does not challenge the findings of fact as set forth in the trial court's order denying his motion to suppress.[2]

At approximately 4:45 p.m. on November 26, 2007, Officer Christopher Gregorio stopped Roger Sinclair Wright for driving without headlights after sunset. Before stopping the car, Officer Gregorio called for backup.

Officer Gregorio approached the car on the driver's side. Wright was the only occupant in the car. Officer Gregorio immediately smelled the "strong odor of marijuana" emanating from the car. Wright admitted that he did not "have on any lights and he was backing up around his dad's house illegally." Wright asked Officer Gregorio to give him a citation and let him go. Officer Gregorio said Wright appeared nervous and was physically shaking.

Officer Gregorio asked Wright twice for the vehicle registration. But each time Wright started to open the glove compartment, he retracted his hand. When Wright finally opened the glove compartment, Officer Gregorio saw a large roll of

[2] Unchallenged findings of fact are treated as verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

money. Wright quickly closed the glove compartment without retrieving the registration, and appeared even more agitated and nervous. Officer Gregorio said Wright was "moving his hand uncontrollably, and his eyes started to well up with tears."

Officer Gregorio arrested Wright for possession of marijuana. The police handcuffed Wright and placed him in the patrol car. Wright gave the officers permission to retrieve the registration from the glove compartment. As Officer Gregorio leaned into the car to get the registration, he noticed the odor of marijuana was much stronger. After reading Wright his Miranda[3] rights, Officer Gregorio asked why he smelled marijuana in the car. In response, Wright admitted smoking marijuana earlier but refused to answer any more questions.[4]

Officer Gregorio requested the assistance of a K-9 drug unit with a drug-sniffing dog. After the dog alerted to the presence of drugs in the car, the police searched the car. The police recovered two baggies of marijuana and a prescription bottle of oxycodone in the console of the passenger compartment, and two baggies of marijuana and a scale in the back seat. The police later obtained a warrant to search the trunk of the car and found a large bag of marijuana, a small bag of marijuana, and a ziplock bag containing 250 pills of MDMA, a/k/a "Ecstasy".

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[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4] According to Officer Gregorio, "Alls he would tell me is he was smoking it. He asked why I was trying to stick it to him and put him in a bind. Again I asked him if there was any marijuana in the car, and he didn't say that he didn't want to answer any more questions, just stopped answering my questions."

The State charged Wright with possession of marijuana with intent to deliver and possession of MDMA with intent to deliver. Wright filed a CrR 3.6 motion to suppress his statements to the police and the drugs. Wright argued that Officer Gregorio was not justified in stopping him for driving without headlights. Alternatively, Wright argued that the stop was a pretext. Wright did not challenge the validity of the search incident to arrest.

Officer Gregorio was the only witness to testify at the CrR 3.6 hearing. The court denied Wright's motion to suppress. The court entered detailed findings of fact and conclusions of law. The court ruled that Officer Gregorio had reasonable suspicion to stop Wright for a traffic infraction and that based on the totality of the circumstances, the stop was not a pretext.

Wright waived his right to a jury trial. The court convicted Wright of possession of marijuana with intent to deliver and the lesser included offense of possession of MDMA.

On appeal, Wright argued that the trial court erred in denying his motion to suppress because the police officer lacked justification to stop the vehicle, and in the alternative, that the traffic stop was a pretext. In an unpublished opinion, we rejected Wright's arguments, and affirmed.

Three days after the opinion was filed, Wright filed a motion to reconsider. Wright claimed that based on the Supreme Court's recent decision in Gant, the search of his car violated the Fourth Amendment. We requested additional briefing and scheduled oral argument on the motion to reconsider. Wright argued for the first

time in his reply brief that the search was also invalid under article I, section 7 of the Washington State Constitution. We asked the State to file a supplemental response to Wright's argument under article I, section 7. Before oral argument, the Washington State Supreme Court issued its decision in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), holding that in the absence of a nexus between the arrestee, the crime of arrest, and the vehicle, an automobile search incident to arrest violates article I, section 7 of the Washington State Constitution.[5]

Automobile Search Incident to Arrest under the Fourth Amendment

Wright asserts that under the United States Supreme Court's recent decision in Gant, the warrantless search of his automobile was invalid under the Fourth Amendment because he was handcuffed and secured in the back of the patrol car.[6] In Gant, the Supreme Court held that police can search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment or it is reasonable to believe evidence of the crime for which he was arrested is in the vehicle. Gant, 129 S.Ct. at 1719. The State contends the search was valid under Gant and the Fourth Amendment because the police had reason to believe evidence of the crime of the arrest might be found in the vehicle.

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[5] We asked the parties to address the decision in Patton at oral argument.

[6] The State concedes that the Supreme Court's decision in Gant applies retroactively to this case. "[A] decision of [the Supreme Court] construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." United States v. Johnson, 457 U.S. 537, 562, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (The rule applies even to decisions constituting a "clear break" with past precedent have retroactive application).

The Fourth Amendment guarantees "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. A warrantless search of an area in which the defendant has a privacy interest is per se unreasonable under the Fourth Amendment subject to "a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In Gant, the Supreme Court rejected a broad interpretation of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and clarified the search incident to arrest exception to the Fourth Amendment as defined in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and as applied to vehicle searches in Belton. The Court held "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 129 S.Ct. at 1723. Where these justifications are absent, "a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." Gant, 129 S.Ct. at 1723-24.

In Chimel, the Court held that the police can conduct a warrantless search of a home incident to an arrest, so long as the search is limited to the area within the arrestee's "immediate control," which is defined as "the area from within which he might gain possession of a weapon or destructible evidence." Chimel, 395 U.S. at

763. The basis for this well-established exception to the warrant requirement is the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence. Chimel, 395 U.S. at 763.

In Belton, a state trooper stopped a car for traveling at an excessive speed. While asking the driver for his license and automobile registration, the trooper smelled burnt marijuana and saw an envelope on the floor of the car marked "Supergold," a name associated with marijuana. Belton, 453 U.S. at 455-56. The trooper arrested all four occupants of the car for unlawful possession of marijuana. During the search of the car, the trooper found marijuana in the envelope marked "Supergold", and cocaine in the pocket of Belton's jacket that was in the back seat of the car. The trial court denied Belton's motion to suppress the cocaine discovered in the search incident to arrest. Belton, 453 U.S. at 456. The Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and any other containers found inside the vehicle. Belton, 453 U.S. at 460 (footnote omitted).

In Thornton v. United States, 541 U.S. 615, 618, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the Court addressed the question of whether the Belton rule applies when the driver leaves the vehicle. In Thornton, before the police were able to pull over Thornton for driving a car with license tags that did not match the vehicle, he parked, and got out of the car. When the police questioned Thornton,

> [he] appeared nervous. He began rambling and licking his lips; he was sweating. Concerned for his safety, Nichols asked petitioner if he had any narcotics or weapons on him or in his vehicle. Petitioner said no. Nichols then asked petitioner if he could pat him down, to which petitioner agreed. Nichols felt a bulge in petitioner's left front pocket and again asked him if he had any illegal narcotics on him. This time petitioner stated that he did, and he reached into his pocket and pulled out two individual bags, one containing three bags of marijuana and the other containing a large amount of crack cocaine.

Thornton, 541 U.S. at 618. The police arrested Thornton for possession of drugs and placed him in a patrol car prior to searching the car and finding a 9-millimeter handgun under the driver's seat. A jury convicted Thornton of possession of cocaine with intent to distribute and illegal possession of a firearm.

The Court held the Belton rule applied and the police were justified in searching the car incident to the arrest. However, in a concurring opinion, Justice O'Connor expressed "dissatisfaction with the state of the law in this area . . . [because] lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than an exception justified by the twin rationales of Chimel v. California. . . ." Thornton, 541 U.S. at 624, (O'Connor, J., concurring in part). In another concurring opinion, Justice Scalia suggested limiting a Belton search to cases where it is reasonable to believe evidence relevant to the crime of arrest might be "found in the vehicle." Thornton, 541 U.S. at 632, (Scalia, J. concurring in judgment).

In Gant, the Court rejected the long-accepted broad interpretation of the Belton rule because it "untether[ed] the rule from the justifications underlying the Chimel exception—a result clearly incompatible with our statement in Belton that it

'in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.'" Gant, 129 S.Ct. at 1719 (quoting Belton, 453 U.S. at 460, n. 3, 101 S.Ct. 2860).

The Court held that because Chimel limited the scope of the search incident to arrest to the person and the area within his immediate control, the police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Gant, 129 S.Ct. at 1719.

> The safety and evidentiary justifications underlying Chimel's reaching-distance rule determine Belton's scope. Accordingly, we hold that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.

Gant, 129 S.Ct. at 1714. But the Court also held that the search of a vehicle incident to arrest is permissible when it is reasonable to believe evidence of the crime of arrest might be found in the vehicle.

> Although it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (Scalia, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, e.g., Atwater v. Lago Vista, 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); Knowles v. Iowa, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including Belton and Thornton, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Gant, 129 S.Ct. at 1719.

While the Court did not elaborate on the reasonable belief standard, the opinion makes clear it requires less than probable cause. Gant, 129 S.Ct. at 1721.[7] The Court in Gant also emphasized that a search incident to arrest is not the only exception to the warrant requirement, and its holding does not implicate other established exceptions. Those exceptions include situations where an officer has reasonable suspicion that an individual is dangerous "and may gain immediate control of weapons" in the car, Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (footnote omitted), and the recognized automobile exception under the Fourth Amendment that allows a warrantless search of an automobile for evidence relevant to both the offense of arrest and other offenses. United States v. Ross, 456 U.S. 798, 807-809, 102 S.Ct. 2157, 72 L. Ed. 2d 572 (1982).

In Gant, the police arrested Gant on an outstanding warrant for driving with a suspended license. The police handcuffed Gant and placed him in the back of a patrol car. In a search of the interior of the car, the police found a gun and a bag of cocaine. The Court held the search violated the Fourth Amendment. Because Gant was arrested for driving with a suspended license and was secured in a patrol car before officers searched his vehicle and found cocaine, the Court concluded that Gant clearly was not within reaching distance of the passenger compartment at the time of the search. Gant, 129 S.Ct. at 1719. The Court also concluded that an

[7] The reasonable belief standard is analogous to the "reasonable suspicion" standard required to justify a Terry search. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See, Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). (Terry search permissible if officer "has reason to believe that the suspect is armed and dangerous.").

evidentiary basis for the search was lacking because "Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car." Gant, 129 S.Ct. at 1719. Thus, there was no reason to believe evidence of the crime of arrest might be found in the car. Gant, 129 S.Ct. at 1719.

Here, while Wright was initially stopped for a traffic violation, he was actually arrested for possession of marijuana, a drug offense. The arresting officer smelled the strong odor of marijuana emanating from the car, observed Wright's agitated and furtive behavior, and saw a large roll of money in the glove compartment. After waiving his Miranda rights, Wright admitted that he had smoked marijuana earlier. Because the unchallenged facts establish there was reason to believe the car contained evidence of the offense for which he was arrested, the search was justified under Gant and the Fourth Amendment.

Automobile Search Incident to Arrest under Washington Constitution Article I Section 7

Wright also argues that based on the Washington State Supreme Court's recent decision in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), the warrantless search of his car violates article I, section 7 of the Washington State Constitution. Because the search incident to arrest was based on probable cause to arrest for possession of marijuana, Wright's reliance on article I, section 7 and Patton is misplaced.

Under article I, section 7, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. Article I,

section 7 provides greater protection of an individual's right to privacy than the Fourth Amendment. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). An individual's right to privacy encompasses automobiles and their contents. O'Neill, 148 Wn.2d at 584. A warrantless search under article I, section 7 is invalid unless an established exception applies. State v. Gocken, 71 Wn. App. 267, 274, 857 P.2d 1074 (1993). The burden is on the State to show an exception to the warrant requirement applies. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008); State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004).

In Patton, the court addressed the justification and application of the search of an automobile incident to arrest exception to the warrant requirement as set forth in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983). The court also rejected the bright line rule adopted in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), that allowed officers to conduct a warrantless search incident to arrest of the passenger compartment of a vehicle. Patton, 167 Wn.2d at 391. The court held that under article I, section 7,

> [T]he search incident to arrest exception requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest. Because no such nexus existed here . . . . we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search . . . .

Patton, 167 Wn.2d at 384; 394-95.

In Patton, the police arrested Patton on an outstanding felony warrant while he was standing next to his car parked in his driveway. After handcuffing Patton and placing him in a patrol car, the police searched the car and found two bags of methamphetamine and $122 cash under the driver's seat. The State charged Patton with possession of methamphetamine and resisting arrest. The trial court granted Patton's motion to suppress the evidence found in the car. The Court of Appeals reversed.

The Washington Supreme Court granted review to address whether the search incident to arrest exception applies to an automobile search where the arrestee is not "a driver or recent occupant of the vehicle, the basis for arrest is not related to the use of the vehicle, and the arrestee is physically detained and secured away from the vehicle before the search." Patton, 167 Wn.2d at 394.

The court rejected the bright line rule in Stroud and reaffirmed the justifications for the search of a vehicle incident to arrest as set forth in Ringer. Patton, 167 Wn.2d at 389-90. In Ringer, Ringer was arrested on an outstanding felony warrant. In a search incident to arrest, the police found drugs. Ringer, 100 Wn.2d at 692. In analyzing the validity of the warrantless search under article I, section 7, the court in Ringer focused on "its origins and to the law of search and seizure at the time our constitution was adopted." Ringer, 100 Wn.2d at 690. Under common law, law enforcement officers were allowed to make warrantless arrests for crimes "committed in their presence or where probable cause existed that a felony had been committed." Ringer, 100 Wn.2d at 691-92.

> At the time the state constitution was adopted, law enforcement officers were authorized to obtain warrants to make arrests and to search for evidence of certain criminal activity. Code of 1881, §§ 967-68, 1026. No statutory provisions authorized warrantless arrests; nevertheless, law enforcement officials were allowed at common law to make warrantless arrests for a misdemeanor or felony committed in their presence or where probable cause existed that a felony had been committed. . . . It seems universally recognized that warrantless searches were allowed of the person of an arrestee when incident to lawful arrest. See, e.g., Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914); State ex rel. Murphy v. Brown, 83 Wash. 100, 105-06, 145 P. 69 (1914); Dillon v. O'Brien, 20 L.R.Ir. 300, 316-17 (Ex.D.1887); Leigh v. Cole, 6 Cox Crim.L.Cas. 329, 332 (Oxford Cir.1853).

Ringer, 100 Wn.2d at 691-92. Based on the common law authorization to only conduct a warrantless search incident to arrest on the grounds of officer safety, or to avoid destruction of evidence of the crime of arrest, the court held the search of Ringer's van violated article I, section 7.

> Based on our understanding of Const. art. 1, § 7, we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. See State v. Michaels, supra. A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

Ringer, 100 Wn.2d at 699.

In interpreting article I, section 7 consistent with the common law, the Ringer court overruled a number of prior decisions that were inconsistent with the historical justifications for a search incident to arrest but cited with approval its decision in State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962). In Michaels, the court held:

> an officer may take into custody a person who commits a misdemeanor in his presence, and upon making the arrest, may

> search the person and his immediate environs for evidence of the crime or tools which would aid in the arrested person's escape.

Michaels, 60 Wn.2d at 642-643.

In addressing whether the police were authorized to search in Patton, the court concluded that the justifications to search a car incident to arrest did not apply because Patton was not a driver or recent occupant of the car, Patton was secured in a patrol car, and there was no evidence of the crime of arrest or contraband in the car.[8]

> Thus, there was no basis to believe evidence relating to Patton's arrest would have been found in the car. Nor did Patton's brief proximity to the car give rise to safety concerns upon his arrest. At the time of the search, Patton was secured in the patrol car, some distance from his vehicle. Further, the record does not indicate that prior to the search there was any evidence of the crime of arrest or contraband in the car, as in Stroud.

Patton, 167 Wn.2d at 395.

Here, unlike in Patton, the unchallenged facts establish Officer Gregorio had probable cause to arrest Wright for possession of marijuana and there was a nexus between his arrest, the crime of arrest, and the search of the vehicle.

RCW 10.31.100 authorizes the police to arrest on probable cause to believe a person has committed a drug crime. RCW 10.31.100(1) provides, in pertinent part:

> Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor . . . involving the use or possession of cannabis . . . shall have the authority to arrest the person.

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[8] The court in Patton expressly notes that the State did not argue there was probable cause to search the car. Patton, 167 Wn.2d at 386.

Long-standing case law also establishes that the police have probable cause to arrest the occupant of a vehicle for possession of a controlled substance "when a trained officer detects that the odor of a controlled substance" emanating from an individual in a vehicle and to search the passenger compartment of the car incident to that arrest. State v. Marcum, 149 Wn. App. 894, 912, 205 P.3d 969 (2009); State v. Huff, 64 Wn. App. 641, 647, 826 P.2d 698 (1992); State v. Compton, 13 Wn. App. 863, 864-65, 538 P.2d 861 (1975).

For example in Compton, a police officer detected marijuana coming from a vehicle and frisked the lone occupant, Compton for weapons. After finding drugs on Compton, the officer then searched the passenger compartment. This court concluded that the odor of marijuana provided sufficient basis to believe that the crime of marijuana possession was being committed in the officer's presence. This in turn gave the officer probable cause to arrest and conduct a warrantless search of the vehicle incident to that arrest. Compton, 13 Wn. App at 865-866.

Our supreme court recently reached the same conclusion in Grande. In Grande, the police officer smelled the odor of marijuana emanating from the car and arrested all of the occupants of the car for possession of marijuana. The court considered the question of "whether the moderate smell of marijuana emanating from a vehicle, without more, establishes probable cause to arrest all occupants of the vehicle and conduct a search incident to arrest." Grande, 164 Wn.2d at 138. The court concluded that based on the facts, there was insufficient individualized probable cause to support the arrest of each occupant because the officer lacked an

evidentiary basis to clearly associate the crime with a particular individual. Grande, 164 Wn.2d at 143. Importantly, in stating that such an arrest would have been valid if the vehicle had not had more than one occupant, the court cited Compton, where there was probable cause to arrest, because "Compton was the only occupant in the vehicle where the smell was emanating." Grande, 164 Wn.2d at 144.

In discussing the interplay between probable cause for a warrantless arrest and probable cause to search, the Grande court states that under both the state and the federal constitution, the validity of a warrantless search or seizure depends upon whether the probable cause standard is met, and that analysis is substantively the same under the Fourth Amendment and article I, section 7. Grande, 164 Wn.2d at 141. The court also recognized that "[a]n equivalent quantum of evidence is required whether the inquiry is one of probable cause to arrest or probable cause to search, although each requires somewhat different facts and circumstances." Grande, 164 Wn.2d at 142, citing 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment; § 3.1(b)(4th ed. 2004).

While the court held that the police lacked individualized probable cause to arrest in Grande, the court explained:

> This does not mean, however, that a law enforcement officer must simply walk away from a vehicle from which the odor of marijuana emanates and in which more than one occupant is present if the officer cannot determine which occupant possessed or used the illegal drug. In this case, because the officer had training and experience to identify the odor of marijuana and smelled this odor emanating from the vehicle, he had probable cause to search the vehicle. See generally Andrea Levinson Ben-Yosef, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana-Federal Cases, 188 A.L.R. Fed. 487 (2003); Andrea Levinson Ben-Yosef, Validity of Warrantless

Search of Motor Vehicle Based on Odor of Marijuana-State Cases, 114 A.L.R.5th 173 (2003).

Grande, 164 Wn.2d at 146. [9]

This case is more like Compton than Patton. In the typical automobile search involved in Patton and Gant, a search after a traffic stop leads to the fortuitous discovery of evidence of an unrelated crime. But in this case, the search focused from its inception on evidence of a crime the officer observed as soon as he stopped the car—marijuana possession. Because this was no fishing expedition in which the police thought they might discover evidence of some unrelated crime, the search was lawful and the police did not invade Wright's right to privacy. [10]

Here, the unchallenged facts establish a clear nexus between Wright, the crime of the arrest, and the search of the car. Wright was the only occupant in the car. As soon as Wright opened the car window and the strong odor of marijuana wafted into the outside air, the officer had probable cause to arrest and search for evidence of the crime the officer knew he was committing. And after arresting Wright for possession of marijuana and advising Wright of his Miranda rights, Wright admitted smoking marijuana earlier.

Because the police had probable cause to arrest Wright for possession of marijuana and to search the car for evidence of the drug crime, the search of the

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[9] (Emphasis added.). Courts in the majority of jurisdictions have concluded that odor of marijuana emanating from a vehicle establishes probable cause to conduct a search of that vehicle. See Andrea Levinson Ben-Yosef, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana-State Cases, 114 A.L.R.5th 173 (2003).

[10] Because this search was performed based on probable cause to arrest and search for evidence of the crime of possession marijuana, the officer had authority of law under article I, section 7. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).

passenger compartment of the car incident to arrest did not violate article I, section 7.[11]

Justification to Stop

Wright also claims the trial court erred in ruling Officer Gregorio's decision to stop the car did not violate his constitutional rights. We review the trial court's findings of fact for substantial evidence and the conclusions of law de novo. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). The court decides issues of fact and makes credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We will not disturb credibility determinations on appeal. Camarillo, 115 Wn.2d at 71; O'Neill, 148 Wn.2d 571. Where, as here, the findings of fact are not challenged, we review de novo whether the findings support the trial court's conclusions of law. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

In general, a warrantless seizure violates both the state and the federal constitution. State v. Ladson, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999). An investigatory detention under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) is an exception. State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). To justify an investigative stop under the Terry exception, a police officer must have a reasonable suspicion based on specific and articulable objective facts that the person stopped has been or is about to be involved in a crime. Terry, 392 U.S. at 21-22. The reasonable suspicion standard is a lower standard than the probable cause standard. Terry v. Ohio, 392 U.S. at 25-26; State v. Dorsey, 145

[11] In a statement of additional authorities, Wright cites the Supreme Court's recent decision in Valdez. Valdez does not change our analysis in this case.

Wn. App. 423, 429, 186 P.3d 363 (2008). In evaluating the reasonableness of such a stop, a court must look to the totality of the circumstances known to the officer at the time of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Our courts have applied the Terry stop exception under the Fourth Amendment and article I, section 7 of the Washington State Constitution to stops incident to traffic infractions. State v. Duncan, 146 Wn.2d 166, 174-75, 43 P.3d 513 (2002). To be lawful, a traffic stop must be justified at its inception. State v. Tijerina, 61 Wn. App. 626, 628-29, 811 P.2d 241 (1991). Police may conduct a warrantless traffic stop if the officer has a reasonable and articulable suspicion that a traffic violation has occurred or is occurring. Ladson, 138 Wn.2d at 349.[12]

Because the sun had set less than 30 minutes before the stop, Wright argues Officer Gregorio did not have a valid basis to stop him under RCW 46.37.020.[13]

RCW 46.37.020 provides:

> Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernable at a distance of one thousand feet ahead shall display lighted headlights, other lights, and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles, and such stop lights, turn signals, and other signaling devices shall be lighted as prescribed for the use of such devices.

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[12] While Wright cites a number of recent decisions that clearly reaffirm that article I, section 7 of our state constitution provides greater protection than the Fourth Amendment, none of those cases stand for the proposition that police cannot legally stop a motor vehicle for a traffic infraction. See State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007) (acknowledging Terry rationale has been extended to traffic infractions).

[13] The sun set at 4:21 p.m. on November 29, 2006, 24 minutes before Wright's vehicle was stopped at approximately 4:45 p.m.

Wright relies on RCW 46.37.020 in an attempt to negate the lawfulness of the traffic stop. However, the question is not whether Wright actually violated the traffic code, but rather whether the facts and circumstances warranted the stop. The reasonableness of a stop under Terry only requires reasonable suspicion to believe Wright violated the traffic code. The undisputed evidence establishes that it was dark, the weather was cold and icy, and Wright was driving without the headlights on. Under these circumstances, it was reasonable for Officer Gregorio to believe Wright had committed a traffic infraction. Even Wright admitted that he thought he had been stopped because he did not have the headlights on. Given the totality of the circumstances, Officer Gregorio was justified in making the traffic stop under Terry. See also Duncan, 146 Wn.2d at 175.

Pretext

As an alternative argument, Wright contends that the traffic stop was a pretext for an unlawful search. A pretextual traffic stop occurs when an officer stop a vehicle, not to enforce the traffic code, but to conduct an investigation unrelated to driving. Ladson, 138 Wn.2d at 349-351. Pretext stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause." State v. Myers, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003). A warrantless traffic stop based on pretext violates article I, section 7 of the Washington State Constitution because it does not fall within any exception to the warrant requirement and

therefore lacks the authority of law necessary to intrude upon a citizen's privacy interests. Ladson, 138 Wn.2d at 358.

In determining whether a stop is pretexual, the totality of the circumstances must be considered, including the subjective intent of the officer and the objective reasonableness of the officer's conduct. If the court finds the stop is pretextual, all subsequently evidence obtained from the stop must be suppressed. Ladson, 138 Wn.2d at 358-359.

Wright focuses on Officer Gregorio's possible motivation for initiating the traffic stop. Noting that Officer Gregorio called for backup due to a "suspicious vehicle stop" and his testimony that the area where the stop occurred was known for car prowls and vehicle thefts, Wright argues that the real reason for the stop was to investigate suspicious criminal conduct, not to enforce the traffic code. But "patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as the enforcement of the traffic code is the actual reason for the stop." State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000). A stop is a pretext only "when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code." State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

The undisputed facts establish that Officer Gregorio initiated the stop based on his observation that the car headlights were not turned on even though it was dark and icy. And unlike the cases cited by Wright, the undisputed facts show that

Officer Gregorio had virtually no opportunity to form an ulterior motive for stopping the car.

Wright also claims that the reason for the stop was because he was a "young African American" driving a late model Lexus. But according to the undisputed facts, Officer Gregorio could not see inside the vehicle prior to initiating the stop. Substantial evidence supports the trial court's conclusion that Wright was stopped for having committed an apparent traffic violation, and not for purposes of conducting an unrelated criminal investigation.

We affirm.

Schindler, J.

WE CONCUR:

Ellington, J.

Cox, J.